7/13/77 [1]

Folder Citation: Collection: Office of Staff Secretary; Series: Presidential Files; Folder: 7/13/77 [1]; Container 30

To See Complete Finding Aid:
http://www.jimmycarterlibrary.gov/library/findingaids/Staff%20Secretary.pdf

THE PRESIDENT'S SCHEDULE

Wednesday - July 13, 1977

8:15	Dr. Zbigniew Brzezinski - The Oval Office.
8:45	Mr. Frank Moore - The Oval Office.
9:00 (5 min.)	Representative Carroll Hubbard, Jr. and Mr. Hugh Haynie, Editorial Cartoonist, Louisville Courier-Journal. (Mr. Frank Moore) - The Oval Office.
10:00	Mr. Jody Powell - The Oval Office.
10:30	Arrival Ceremony for His Excellency Helmut Schmidt, Chancellor of the Federal Republic of Germany and Mrs. Schmidt. The South Grounds.
11:00 (60 min.)	Meeting with Chancellor Helmut Schmidt. (Dr. Zbigniew Brzezinski) - The Oval Office and the Cabinet Room.
12:30 (30 min.)	Lunch with Governor Brendan Byrne - Oval Office.
1:30 (5 min.)	Senator Walter (Dee) Huddleston, Mr. and Mrs. Bill Schmidt and Mr. Larry Schmidt. (Mr. Frank Moore) - The Oval Office.
1:45 (10 min.)	Sheriff William Lucas. (Mr. Robert Lipshutz). The Oval Office.
2:00 (20 min.)	Senator Mike Gravel. (Mr. Frank Moore). The Oval Office.
2:45	Mr. Greg Schneiders - The Oval Office.
2:55	Mr. and Mrs. Manuel Silva - The Oval Office.
3:00 (15 min.)	Messrs. Charles Warren, Gus Speth and Marion Edy. The Oval Office.
7:30	Dinner (Black Tie) Honoring Chancellor and Mrs. Helmut Schmidt - The State Floor

Rick

(new Bill Hulley sealed)

orig directed to Brown

cc Br2 in envelope personal

~~Secret~~ Message to Sec. Brown

SECRET

THE WHITE HOUSE

WASHINGTON

M/13/77

To Harold Brown

I am not convinced that we need both the Tomahawk & the A Force ALCM. We certainly cannot afford to waste money on duplicative systems.

Please Comment —

Jimmy

THE WHITE HOUSE
WASHINGTON

July 13, 1977

The Vice President
Stu Eizenstat
Bob Lipshutz
Frank Moore
Jack Watson
Landon Butler
Bert Lance
Charlie Shultze

For your information and appropriate handling.

Rick Hutcheson

RE: LABOR LAW REFORM

THE WHITE HOUSE

WASHINGTON

July 11, 1977

Stu
F

MEMORANDUM FOR: THE PRESIDENT

FROM: STU EIZENSTAT
BILL JOHNSTON

SUBJECT: Labor Law Reform

BACKGROUND

Last week you approved 8 of the 13 labor law reforms outlined in my memo to you (copy attached). You indicated a preference for a message to Congress, rather than an Administration bill. You asked for more information on the other 5 issues and instructed Landon and me to work out acceptable language for the message with CEA and Commerce.

We have met twice with Charlie Schultze, Ray Marshall, and representatives of the Commerce Department. Along with Landon and Hamilton, we have also met again with representatives of the AFL-CIO. We have persuaded the unions to agree to the message strategy you suggested.

The items slated for inclusion in the message are:

- Increase the Board from 5 to 7.
- Summary affirmance of ALJ decision by 2-member panels.
- Time limits on elections (exact periods to be worked out).
- Rule-making to codify Board precedents.
- Debarment from federal contracts for willful violators.
- Double back pay for those unlawfully discharged.
- Expedited enforcement of Board orders.
- Giving the Board power to require employers to pay workers for their estimated wage loss for the period during which the employer refused to bargain. (You approved this verbally in our meeting July 1)

OUTSTANDING ISSUES

On four remaining items there is still disagreement. One strategy we discussed would be to include some or all of these measures in testimony by Ray Marshall, rather than in your message. This would give the unions some support but would, to some extent, separate you personally from the issues.

The unions consider items 1 and 2 to be of greatest importance among the remaining items.

1) Equal Access

You expressed great concern that any provision which appeared to compromise employer property rights would invite conservative opposition which could doom the whole bill.

The Labor Department has proposed alternative language seeking to minimize this danger. Under their proposal, the Board would promulgate rules which would assure that if an employer addressed employees on company time or property regarding issues relating to representation by a union, then the employees would be guaranteed an "equal opportunity to obtain information concerning such issues" from the union. This "equal opportunity" would be subject to reasonable conditions including due regard for the needs of the employer to maintain continuity of production. This could be phrased even more clearly in terms of the employee's right to equally balanced information - so that if he is addressed on company premises by the employer, "the employee shall also be afforded the equal opportunity to obtain information" from the unions on such issues.

This formulation casts the issue in terms of employees rights to information, and avoids mention of property rights. Labor believes, and I agree, that it would be more difficult for opponents to criticize or sloganeer against a provision couched in these terms. Since this issue arouses intense and irrational antagonisms, however, there is still the danger that any mention of union rights to equal opportunity will meet strong emotional opposition.

Commerce and CEA have no objection to this provision, feeling that it primarily involves political rather than substantive judgments.

While I recognize the dangers in this provision, I recommend that you accept the Labor Department's modified language. This is apparently organized labor's highest priority among the outstanding issues.

A. Presidential Message

Approve_____ Disapprove_____ Comment_____

B. Marshall Testimony

Approve ✓ Disapprove_____ Comment_____

2) Economic Strikers

Currently if a union goes out on strike over purely economic issues, the employer has a right to hire permanent replacements. (Such replacements cannot be hired in strikes called over unfair labor practices). When the economic strike is over, the striking employees have a right to any new job openings, but they do not the right to displace the strikebreakers.

The Labor Department proposes to change this rule to allow employees who strike over economic issues in bargaining over an initial contract to return to their old jobs when the strike is over, even if this means that the replacement workers must be fired.

The Labor Department believes strongly that its proposed amendment provides crucial employment safeguards in the limited context of a first contract situation when most unions are relatively weak. The Department notes that strike settlements generally include a provision guaranteeing strikers their previous jobs. They predict that this provision would have its largest impact in the organization of hotel, motel and restaurant workers and maintenance employees.

Labor also argues that the provision would not have a substantial impact on employment practices. Those few employers who choose to operate during a strike would still be able to hire temporary replacements and continue production. These replacements would almost always be considered probationary employees and would thus normally be subject to termination, even without this provision if the strike ended before the probationary period was over.

The Commerce Department and CEA object to this change. They believe that it could increase inflation and lead to increased work stoppages.

They fear that a guarantee of job replacement is likely to make strikes more likely in first contract situations. While they concede that it is difficult to quantify the number of additional lost work days due to increased strikes, Commerce believes that the number would be substantial, especially in the South.

CEA and Commerce also argue that the guarantee of a return to the job would give labor a weapon in a first contract situation that would not be available in subsequent negotiations. This could encourage unions to seek greater wage gains in the first contract, with inflationary consequences.

Finally, the Department of Commerce argues that this change could upset the balance that has grown up over the years in labor-management relations. Industry feels strongly that current law requires both management and labor to take risks in a strike situation. Requiring an employer to give an employee his job back at the end of a strike significantly reduces the risk that labor incurs, and increases the difficulty that employers would have in hiring replacement workers. Given the other changes in labor law which the Administration has agreed to support, Commerce questions whether accepting this additional provision will not significantly alter the existing balance.

The concerns expressed by Commerce and CEA have persuaded me that we should not propose this change without further study of its impacts.

A. Presidential Message

Approve_____ Disapprove✓_____ Comment_____

B. Marshall Testimony

Approve_____ Disapprove✓_____ Comment_____

3) Guards

You were concerned about the need to have loyal employees to protect the plant.

The Labor Department points out that guards are now often unionized, and that these unions are now sometimes affiliated with the UAW and the AFL-CIO. Under present law however, these guard unions cannot be certified by the NLRB if they are affiliated with non-guard unions. Thus guard unions must either be independent, or they are not fully protected by NLRB rules and procedures.

The proposed change would allow guard unions to form these affiliations without losing NLRB protection. Under the Labor Department's modified proposal, a union could not represent guards at a plant if its national or international division represented non-guards at that plant. This will have the effect of allowing separate AFL-CIO unions to represent guards and non-guards at one plant.

Commerce has no objection to this proposal.

CEA is concerned that the affiliation of guard unions with non-guard unions could increase the likelihood of sympathy strikes or other job actions by guards during times of labor unrest. The Labor Department believes that this is unlikely. They argue that sympathy strikes are as likely when workers are organized and unaffiliated as when they are affiliated. They point out that most contracts with guard unions contain no-strike and arbitration clauses.

I support this proposal, modified as the Labor Department suggests to prevent guards and non-guards at the same plant from being represented by the same national or international union. This provision will not in my judgment, compromise the guard protection available to employers.

A. Presidential Message

Approve_____ Disapprove_____ Comment_____

B. Marshall Testimony

Approve ✓ Disapprove_____ Comment_____

4) Mandatory Injunctions for Unlawful Dismissal and Refusal to Bargain

You questioned whether these injunctions should be mandatory or discretionary as the law now allows.

Commerce, CEA and Labor agreed that preliminary injunctions should be mandated in cases of alleged unlawful discharge.

Labor argues that preliminary injunctions should also be required in cases of alleged refusal to bargain after an expedited first election. They argue that an injunction does not involve any penalties or moot any legal issues. Its application is limited to cases in which the Board had ordered an expedited election--those cases in which the representation issues are relatively straightforward. It does not require the parties to sign a contract, but merely directs them to meet and confer.

In addition, they point out that these injunctions would be issued by a court following a legal hearing. The courts will refuse to grant these injunctions unless they find probable cause to believe that unlawful conduct has taken place. Moreover, the NLRB would not even seek the injunctions until its own investigators had ascertained that there was probable cause to suspect a violation.

Finally the Labor Department notes that failure to grant a preliminary injunction for refusal to bargain can do irreparable harm to the union and its employees. If an employer could refuse to bargain until the completion of prolonged legal hearings, the union's support among the employees could be severely eroded because of the unions obvious ineffectiveness.

The Commerce Department opposes making preliminary injunctions mandatory in cases of refusal to bargain. They argue that rather than making these injunctions mandatory and putting more collective bargaining cases onto the courts, that the Board should be strongly encouraged to use its existing discretionary powers.

If the proposed change were enacted, Commerce argues, the work load on the Board, in the courts, and on business would be substantially increased. The Board and the employer would be forced to present detailed arguments for and against the issuance of the injunctions whether they were justified or not.

I believe that at a minimum the Board should be required to seek preliminary injunctions in cases of unlawful discharge, as all agencies agree. These mandatory injunctions would help redress the imbalance that now exists in the use of injunctions. Under current law mandatory injunctions are most often used against unfair union labor practices, while the discretionary injunctions which may be used against employers are seldom sought.

only

A. Presidential Message

Approve ✓ Disapprove _____ Comment _____

B. Marshall Testimony

Approve _____ Disapprove _____ Comment _____

I also believe that the Board should be required to seek preliminary injunctions in cases of refusal to bargain after an expedited first election. This injunction does nothing more than to require the company to sit down and talk to the union.

A. Presidential Message

Discretionary seems adequate

Approve _____ Disapprove ✓ Comment _____

B. Marshall Testimony

Approve _____ Disapprove _____ Comment _____

C. Encourage the Board to use its Discretionary Powers in Cases of Refusal to Bargain. (Commerce supports)

Approve ✓ Disapprove _____ Comment _____

5) Foreign Flag Ships

One item about which you had concern, the inclusion of foreign flag ships under the NLRA, has been dropped from consideration as an Administration proposal (The AFL-CIO intends, however, to continue to seek passage of this change.) We, and all the agencies involved, agreed that there were too many problems with this proposal to include it in our message. There was interagency agreement that the message should mention the need to take action to encourage repatriation of American owned ships to American operation.

Approve ✓ Disapprove _____ Comment _____

IMPLEMENTATION

Pending your approval, we have tentatively planned the following execution of your instructions. A message would be sent to Congress on July 15 to coincide with the introduction by Congressman Thompson of labor law reform legislation. The AFL-CIO will probably want this legislation to contain all 13 points even if we do not support them. Our message would state the need for labor law reform, would endorse the specific concepts which you support, and would express a willingness to work with Congress on other changes that may be needed. The Labor Department would subsequently testify on pending labor law reform bills. On issues not covered by our message, or on which you had not specifically authorized Ray to support the measure, the Department would express concern for existing problems, but would take no position pending further study.

no

We suggest that in order to draw some attention to this message, and to give some credit to Congressional leaders who will be most involved in its passage, you may wish to meet briefly with Senators Javits and Williams, and with Representative Thompson on Friday July 15.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

INFORMATION 13 July 1977

TO: THE PRESIDENT

FROM: RICK HUTCHESON

SUBJECT: Summary of OMB Comments on Labor-Law Reform Proposals

1. Equal Access. No objection in principle.

   (However, OMB notes that the provision is highly controversial, and the proposed language may not diminish the opposition envisioned under the original proposal - uncertainty exists as to what would constitute managerial comment refusing equal access to opposing views.)

2. Replacement of Economic Strikers. Agrees with CEA and Commerce that this proposal should be opposed.

   OMB observes that until a contract is signed, an employer has a right to hire his own work force, and reemployment is a legitimate issue for bargaining.

3. Greater Protection for Guards. Oppose.

   No evidence is presented that the guards have been harmed under the law; in the absence of such harm, protection of the employer's property is a good reason for current law.

4. Mandatory Injunctions for Unlawful Dismissal and Refusal to Bargain. No objection.

5. Foreign Flag Ships. Agree with the decision to drop the proposal as too complicated to be resolved in a short time.

6/30/77

THE PRESIDENT HAS SEEN.

THE WHITE HOUSE

WASHINGTON

June 30, 1977

Stu - I prefer a message endorsing concepts and principles. We can deal with specifics later. I'll have to learn more - J

MEMORANDUM FOR: THE PRESIDENT

FROM: STU EIZENSTAT Stu

SUBJECT: Labor Law Reform

BACKGROUND

The AFL-CIO and the U.A.W. have declared that labor law reform is this year's top legislative priority. The unions feel that the 1974 Taft-Hartley Act, and particularly its rules governing union organizing efforts, unfairly favors management.

A bill, H.R. 77, embodying some of the union-backed reforms was introduced by Congressman Thompson in January. During the spring the AFL-CIO drafted a much more extensive bill. After several rounds for consultation with the Labor Department the AFL-CIO agreed to a much more modest set of reforms outlined below.

Three highly controversial proposals were deleted during this round of consultations - a provision to repeal 14B, a provision that would have allowed certification of a union as a bargaining agent without an election in some cases, and a provision that would have required employers taking over a business to honor the old union contract. The AFL-CIO accepted these major compromises, along with a number of lesser ones, because they very much want Administration backing for their bill. Without our active support it is doubtful that any labor law reform bill can pass Congress. Even if the unions do not receive our support, however, they expect to introduce and push this package of reforms very soon. They have asked for a decision on these reforms by July 7.

ANALYSIS

The effect of this set of proposals is generally to streamline the labor laws and to make it easier for unions to organize. Under current law, companies can often use procedural delays to weaken union organizing efforts. The law's remedies are so weak that in some cases outright flaunting of the law is

less costly than collective bargaining and the subsequent wage settlements. The package focuses on procedural changes and speed-ups, strengthened sanctions against employers guilty of unfair labor practices, and coverage expansions.

The business community argues that the changes will tip the current balance in labor-management relations too much toward labor. I disagree. I have met on three occasions with leaders from the Business Roundtable - Chamber of Commerce - National Association of Manufacturers to specifically discuss labor law reform. While, of course, they would prefer to see no change in the labor laws, many of their specific criticisms have been dealt with in our revisions.

A coalition of business groups intends not only to lobby against these proposals, but to introduce their own amendments to the labor laws, presumably ones intended to favor employers. It is likely that this issue will develop into a tough battle in Congress, with final passage delayed until next year, if at all.

Because labor law reform is such a high priority with organized labor, we and the Labor Department have cooperated closely with the unions in the development of this package. At the same time the Labor Department has tried to limit the proposals to measures that remedy actual inequities in the law, as opposed to simply shifting its balance toward labor.

Prior to submitting these proposals from the Labor Department to you I have circulated them to the Departments of Commerce, Justice and Treasury, and to CEA, OMB and the Vice President. ~~Their comments are attached, and~~ the analysis below reflects their concerns.

OPTIONS

I believe that there are three possible strategies:

1) Neutrality We could take a hands off attitude on the grounds that it is not worth investing our political capital in this potentially bloody battle. The unions would consider this tantamount to opposition.

2) A Labor Law Reform Message As in our airline message, we could endorse the concepts and principles of labor law reform without detailing them or preparing legislative language.

3) A Message Together with an Administration Bill The Vice President, Ray Marshall and I support this course. If we adopt this course we should be able to extract a much greater measure of cooperation from the AFL-CIO over the course of the next year.

It is unlikely that the AFL-CIO will accept a severely pared down Administration bill, since they have conceded so much already in their negotiations with the Labor Department. Therefore, if you cannot support most of this package, the message or neutrality strategy is probably preferable. If you agree with most of these reforms, however, then an Administration bill is the option with the most political benefit.

It is difficult to overestimate the importance of this matter in terms of our future relationship with organized labor. Because of budget constraints and fiscal considerations, we will be unable to satisfy their desires in many areas requiring expenditure of government funds. This is an issue without adverse budget considerations, which the unions very much want. I think it can help cement our relations for a good while.

Following are the "bare bones" provisions now remaining in the Labor Department's package of amendments to the National Labor Relations Act (NLRA). Secretary Marshall strongly recommends all of these remaining proposals.

PROPOSED REFORMS

Not all agencies commented on each of the reforms. All specific comments of the agencies surveyed are reflected. The Vice President, the Secretary of the Treasury and the Attorney General expressed non-specific approval of the whole package.

I. Expedited Procedures

A. Board Membership

The number of board members would be increased from five to seven (budget costs $2 million). This should enable the board to better handle its growing back log of cases along with the substantial additional powers proposed in these reforms. Since the Board divides its work among small panels of its members, more members would allow more panels to operate. The American Bar Association has recommended an increase to 9 members.

OMB opposes this increase on the grounds that the Board may be able to increase its productivity with better utilization of existing resources.

Commerce and CEA do not oppose this change. DOL supports it.

I believe that the Board should be increased to 7 members.

Yes ✓ No_____ Comment_____ J

B. Summary Affirmance of Administrative Law Judge Decisions

The decrees of the Administrative Law Judges (ALJs) would be affirmed in simpler cases by 2-member panels of the Board, rather than by the current three-member panels. Currently, the 94 ALJs across the country make all initial decisions regarding complaints of unfair labor practices. These decisions are in the form of recommendations to the Board in Washington, and do not become final until the Board acts on them. The Board takes an average of 120 days to review these decisions, resolving about 25% in less than 109 days, but taking more than 221 days to decide on the most complex 25%. About 2/5 of all ALJ decisions are totally or partially reversed by the Board. By allowing the Board to delegate its decision making authority to a greater degree, this reform aims at speeding up the review process. This

procedure is consistent with those used by the Courts of Appeal in their summary affirmance procedure. The NLRB could determine which more complex cases would be heard by the full Board.

OMB does not support this change on the grounds that it would have little substantial impact. They prefer the procedure of allowing the ALJ's ruling to become final unless the Board grants review. This procedure was embodied in the H.R. 77 but was modified by the Labor Department in the current plan because of the high rate of reversals of ALJ decisions by the Board. The business community strongly objected to delegating as much authority to the ALJs as OMB proposes. Thus the proposal as it is, is a more moderate approach than reflected in H.R. 77.

CEA and Commerce have no objection to the 2-member panel affirmation. DOL supports this change.

I support the 2-member panel approach.

Yes ✓ No_____ Comment_____ F

C. Elections

1) Time Limits

The Labor Department and our staff succeeded in moving the AFL-CIO off of its original position that no election would be necessary, upon a showing of certain evidence that a majority of workers wished to join a union.

As the provision now reads, in cases in which a majority of employees in an appropriate unit have signed authorization cards, an election would be required within 15 days of the filing of a petition with the Board (25 days for units larger than 250 employees.) All other elections would be required within 45 days, except for those of "exceptional novelty or complexity" which would have to be held within 75 days. In complex cases in which the Board could not resolve the issues by the time of the election, the election would be held anyway. If the subsequent decision changed the unit or eligibility rules under which the election was held a new election would be called.

Currently the median time for holding an uncontested election is 56 days, while the median for contested elections in which the issues are resolved at the regional level is 75 days. These two kinds of cases comprise 99% of all elections. For the 1% of cases in which the issues must be resolved by the Board, the median time before an election is 275 days.

The Labor Department argues that delay almost always works in favor of an employer resisting unionization. They believe that under current law employers can unfairly delay elections by contesting such things as the appropriateness of the unit or the eligibility of certain employees to vote in the election. Time limits would eliminate the incentive to frivolously contest elections.

The Chairman of the NLRB has indicated that the proposed time limits are feasible.

CEA, OMB and Commerce all feel that the time limits may be too inflexible. They propose targets rather than limits.

I recommend that some specific time limits be adopted. To satisfy concerns that the limits are too restrictive we could consider a modest lengthening of the periods. But the principle that an election should be held after a fixed time is important and I support its inclusion in this legislation.

Yes ✓ No _____ Comment Principle ok J

2) Unit Determination by Rule-Making

The legislation would instruct the Board to promulgate rules governing appropriate units for collective bargaining and for eligibility to vote in union elections.

Currently the Board resolves most of these issues on a case-by-case basis. Greater codification of the rules could cut down on delay and reduce the uncertainties in the law. This would be consistent with the changes other agencies have been encouraged to adopt, moving from time-consuming, case-by-case adjudicative decision-making to more clearly defined and speedier rule-making.

OMB does not support this change because they believe that everything that could be covered by a rule in this area is already covered by an NLRB precedent. The Department of Labor feels, however, the NLRB precedents are inconsistently applied, and that rules would insure fairer and faster application of Board policies. Commerce supports rulemaking, but believes that it should not be tied to time limits for elections. (Commerce's concern has been dealt with in the most recent draft).

I support this rulemaking procedure.

Yes ✓ No_____ Comment_____

3) Equal Opportunity to Address Employees

The Board would be instructed to issue regulations requiring that employers and employees have "equal assured opportunity" to address all employees during a union's organizing efforts. Depending on how the Board wrote these regulations, this could grant unions, in some cases, rights to go on company property to make their case.

Currently, unions seeking to address employees are generally limited to calling or visiting them in their homes, or to distributing literature outside plant gates. Employers have much greater access to employees, since they can make their case on company time and company property.

The AFL-CIO had proposed that the legislation itself grant equal rights of access to unions. Our procedure will give the Board the power to define the appropriate rules to govern union rights.

OMB supports this change in principle, but warns of definitional and enforcement problems with an "equal" standard. Schultze agrees with the principle but suggests "full opportunity" rather than "equal". It should be noted that in cases in which an employer chooses not to make any case to his employees prior to a union election, a "full" standard might entail broader union rights than "equal".

Commerce supports this change in principle, but believes that it is very important to maintain private property rights. They urge that any legislative instruction to the Board specifically mention these property rights. The Department of Labor feels that the issue is not one of property rights versus union rights. They point out that under an "equal opportunity" standard that an employer could not be required to grant access to unions unless he used company time or property to argue against unionization. The controlling factor would be a decision by the employer.

This will be one of the most controversial aspects of this package. Unions should have a fair chance to make their case, but employers obviously also have rights to control their operations and to limit access to their facilities. Therefore we recommend that the Board be instructed to promulgate rules granting unions "equal assured opportunity to address employees prior to an election consistent with the employer's right to the reasonably unimpeded operation of his business." Our latest conversations with the AFL-CIO indicate that they would be willing to accept such a modification.

This will be the postcard campaign theme

Yes ? No ? Comment Property rights ? can kill entire bill

II. Strengthened Remedies Against Unfair Employer Labor Practices

A. Participation in Federal Contracts

Employers guilty of willfully violating a Board order enforced by a court decree would be debarred from participating in new federal contracts for three years. The Secretary of Labor could exempt a company from this penalty if he found it was in the national interest, or if the company was the sole source of a needed product. This remedy would apply only to cases involving coercion of employees or discrimination based on union membership. Currently there is no such provision in the law.

OMB supports this provision but argues that similar sanctions (i.e., large fines) should also apply to firms without federal contracts and to unions guilty of unfair labor practices. The Department of Labor argues that fines for other violators are inconsistent with the intent of this provision, which is simply to insure that federal dollars do not go to those who willfully

violate the nations laws. They point out that this sanction is used to enforce other federal laws (such as Davis-Bacon, Service Contracts, OFCC, etc.).

Commerce finds an automatic 3 year debarment objectionable. They would prefer to see all firms subject to penalties, and they believe that debarment should be lifted when a firm comes into compliance.

The Department of Labor argues that lifting the sanctions when a firm comes into compliance would allow a firm to circumvent the law. For example, a firm could fire workers for union activities and then later, when the NLRB threatened to cut off federal contracts, it could simply rehire them. The damage would already have been done however.

I agree with the Department of Labor that a 3 year debarment should be written into the law. If this period (which is standard in other debarment laws) is considered to long we could agree to compromise on a somewhat shorter period.

Yes ✓ No_____ Comment_____ I

B. Double Back Pay

Employees unlawfully discharged for union activity during the initial organizing period would be entitled to reinstatement and double back pay. This would not apply to any subsequent period.

Currently the Board has the authority to require reinstatement and back pay awards, but this award is based on back pay less the employee's interim earnings (the "mitigation of damage" rule). The result is lengthy proceedings to determine the amount of damages and interim earnings and an incentive for companies to contest and minimize these awards. Typically these back pay awards are quite small and are often delayed for years.

Double back pay computed without offsetting factors would greatly simplify and streamline this procedure.

OMB does not object to this change, if analysis supports this estimate of damages to the employee.

Commerce has no comment.

I support this change.

Yes ✓ No_____ Comment_____ I

C. Remedies for Refusal to Bargain for First Contract

The NLRA would be amended to authorize the Board to require companies found guilty of refusing to bargain in good faith for a first contract to recompense employees for the presumed loss of benefits during the unfair delay. This compensation would be the difference between the wages and fringes received by the employees during the delay and these benefits multiplied by the average percentage increase in all labor contract settlements signed during the delay, as measured by a standard BLS index. For example, if first contract settlements had averaged 8% in the period of delay, then the employer could be required to pay his employees a bonus of 8% of the pay they earned during the delay.

Currently employers in some cases simply refuse to bargain after the union wins an election, and then litigate the subsequent "order to bargain" issued by the Board. They prefer the legal costs to the higher settlements that might result from a collective bargaining agreement. This provision takes away this incentive to delay by litigation.

OMB has no objection in principle but wants to further analyze the choice of index and how it would be used. Commerce believes that the remedy gives the Board too much authority to determine wage rates. In practice the distinction between a rigid but legal bargaining stance and an illegal pattern of refusing to bargain is based partly on the Board's judgment. Commerce questions whether the government should be so deeply involved in these issues, and urges further study.

CEA has no objection.

I support this remedy. The Board would have to find a company guilty of refusing to bargain before imposing any penalties. Since this finding is based on a gross showing of a pattern of bad faith, I believe that there

are sufficient safeguards to protect companies. The Department of Labor points out that the strength of this remedy will tend to make the Board very judicious in its use.

Yes_____ No_____ Comment ?

D. Preliminary Injunctions

The Board would be required to seek preliminary injunctions (prior to the issuance of a formal complaint) against companies accused of refusing to bargain after expedited first elections, and against companies accused of illegally discharging an employee during the initial bargaining or organizing phase. This injunction would be issued only after a local investigation by NLRB officials revealed probable cause to suspect these violations had occurred.

Currently the Board is only required to seek injunctions prior to issuance of a complaint in cases of secondary boycotts, unlawful picketing, "hot-cargo" agreements, and coercion to join or bargain with a union. It has discretionary power to seek preliminary injunctions after a complaint is issued in other cases of labor law violation. It has used this discretionary power sparingly.

According to the Department of Labor the intent of existing preliminary injuction authority in the Board is to protect businesses against union practices which have a particularly deleterious impact on their operations. This new authority would recognize that certain unfair employer practices can have an equally deleterious effect on workers and unions.

OMB has no objection to this proposal. Commerce opposes on the ground that the NLRB already has sufficient power to seek injunctive relief. Commerce believes that it is undesirable to make it mandatory for the Board to seek preliminary injunctions in cases in which an employer is accused of refusing to bargain after an expedited election.

Members of the current Board are concerned that this change would increase the workload of the Board but the Chairman has assured us that this will not be unmanageable.

I believe the Board should be required to seek injunctive relief in cases of refusal to bargain and unlawful discharge. The requirement that the local Board make "probable cause" and "irreparable damage" findings insures that this provision would not be abused.

Yes_____ No_____ Comment ?

D. Expedited Enforcement of Board Orders

The Board would be required to file its orders with the Appeals Court within 30 days of a decision, if neither party appeals within this time limit. Upon receipt of the Board order by the Court the order would become final.

Presently there is no time limit for the Board to file its orders with the Court. In the past this had lead to some delay. Since this delay has not been largely cleared up through administrative action, this proposal will have little practical impact but will act as a statuatory guide to assure that the NLRB acts expeditiously.

No agencies object.

I support.

Yes ✓ No_____ Comment_____ F

III. Other Amendments

A. Foreign Flag Ships

American owned foreign flag ships would be brought under the NLRA jurisdiction, if the ships have more substantial contacts with American ports than with those of the nation of registry.

A 1962 Supreme Court ruling held that the NLRA did not cover workers on foreign flag ships, in the absence of a specific expression of Congressional intent. This proposal would overturn that ruling by providing a specific expression of Congessional intent.

OMB opposes this change, citing concerns about international agreements, and enforcement problems. Commerce is sympathetic to the goals of the change, but suggests study of the costs. State is (unofficially) opposed. Charlie Schultze suggests limiting its impact to ships whose home ports and base of operation is the U.S. This would exclude the flags of convenience ships but would catch, for example, the foreign flag fishing fleets based in San Diego. In practice such a distinction would be difficult to enforce and would invite subterfuges to avoid the law. It could also encourage some transfer of ships out of the country.

Applying the NLRA to foreign flag ships is primarily aimed at flag-of-convenience shippers, particularly the oil companies who escape American labor costs by hiring foreign crews to work on their foreign registered vessels. The business community warns that this change may have the impact of forcing multinational companies to divest themselves of their foreign flag ships, rather than reregistering them.

I believe that foreign flag ships should be brought under the NLRA. The danger of transfer outside the United States is small because on modern ships labor costs are generally a small fraction of shipping costs. This change will tend to encourage the repatriation of American shipping to our flag, consistent with our other policies in the maritime area.

Yes_____ No_____ Comment 7

B. Greater Protection for Guards

The proposal would repeal current restrictions on the organization and representation of guards.

Currently guards cannot be represented by a union that includes non-guards, and a guard union cannot be affiliated with an organization that admits employees other than guards. The practical effect of this is to require separate unions solely for guards and to prohibit these unions from affiliating with the AFL-CIO.

The Congressional intent of this provision was to insure that employers would have loyal employees to protect people and property in the event of a strike or labor unrest. Separate unions were thought to protect against a conflict of interest.

The Labor Department's proposal retains the prohibition against a single unit being the bargaining agent for both guards and non-guards at one location. But it would allow guards to join unions which have non-guard members, and it would allow guard unions to affiliate with non-guard unions. This should assure that the concerns prompting the current law are satisfied, without the meat-ax approach now employed.

OMB and CEA object to this change on the grounds that there is no demonstration of harm to guards under the current system. In the absence of such a demonstration they feel that the original justification of the restriction is still valid.

Commerce has no objection.

I support this change. Our proposal provides adequate safeguards against conflicts of interest or disloyalty by guards. It corrects a long-standing inequity which limits the freedom of guards to join unions of their own choosing.

Yes_____ No_____ Comment ?

D. Replacements for Economic Strikers

This proposal would allow workers involved in a first strike over economic issues to displace, at the end of the strike, strike breakers hired to replace them during the strike. This right would apply only to workers striking over an initial collective bargaining agreement.

Currently striking workers have the right to replace strike breakers only if the strike was called or prolonged because of an employer's unfair labor practices. In strikes that are purely over economic

issues the employer has the right to hire permanent replacements. This change would remove the danger of job loss for workers who go out on strike to obtain their initial contract.

OMB opposes this change on the ground that an employer should have the right to choose his workforce prior to reaching a first union contract. Commerce calls it a fundamental shift in labor law and asks for more information to analyze the issue.

I support this change proposed by the Labor Department. In negotiations for a first contract the union is usually very weak, with little allegiance from its members. It can seldom risk an economic strike if its members are aware they could lose their jobs. This right to reinstatement would not, of course involve any back pay.

Yes_____ No_____ Comment ?

U. S. DEPARTMENT OF LABOR

OFFICE OF THE SECRETARY

WASHINGTON

July 8, 1977

LABOR LAW REFORM

There have been extensive discussions with the Department of Labor, Department of Commerce and Council of Economic Advisers in the last week on the five points in the labor law reform package which were not specifically approved. The result of these discussions are as follows:

1. Equal Access. Commerce and CEA have no substantive objections to this proposal, although they agree, as does Labor, that it could become the basis of a postcard campaign. It was the consensus, however, that we might mitigate the efficacy of such a campaign by recasting the provision in terms of the employee's opportunity for information. The new language which we propose would not refer to the union's right of access to the employer's property, but rather to the employee's right to information. The provision would only apply where the employer chooses to address employees on its premises or during working hours while an organizing campaign is in progress. Finally, the language would specifically protect the employer's need to maintain continuity of production and employee discipline. The revised proposal would read as follows:

Section 6(b)(1). The Board shall, within 12 months after the effective date of this subsection, exercise its authority under subsection (a) of this section to implement the provisions of subsection (c)(6) of section 9 (including, but not limited to, rules (A) which shall, subject to reasonable conditions, including due regard for the needs of the employer to maintain the continuity of production, assure that if an employer or employer representative

addresses the employees on its premises or during working time on issues relating to representation by a labor organization during a period of time that employees are seeking representation by a labor organization, the employees shall be assured an equal opportunity to obtain information concerning such issues from such labor organization; (B) to facilitate . . .

2. Guards. The Department of Labor requests reconsideration of a modified provision permitting the organization of guards by unions which also represent nonguard employees or which are affiliated with such unions. Under current law, guards can be organized. The limitation imposed in 1947 is that unions representing guards cannot be certified by the Board (and thus entitled to use the Board's processes in order to protect its members) if they admit nonguard employees or are affiliated with a union which admits nonguard employees. Despite this provision, the more powerful unions continue to represent guards since such representation is not illegal and since these unions are not dependent on the Board's processes for protection. Thus, some 23,000 guards are currently organized by the Teamsters, United Steelworkers, Laborers and Service Employees International Union. In addition, guards are organized by independent unions (which can be certified); these independent unions were AFL-CIO unions prior to 1947. They are the United Plant Guard Association, which was once part of the UAW, and the International Guard Union, which was once part of the ILA. The UPGA represents, e.g., guards at missile sites, auto plants, steel mills, rubber plants, etc.

The only change proposed is to enable a larger number of unions to represent guards by removing some of the certification limitations from unions which represent nonguard employees as well. The guards would continue to be in separate bargaining units, and would be represented by different labor organizations than the employers' nonguard employees. If you believe that these limitations are insufficient, the provision could be redrafted to prohibit a local union from representing guards if its national or international represents nonguard employees of the employer at the same location.

Commerce has no objection to this proposal. The CEA speculates that such a change might result in more sympathy strikes by the guard employees. Labor does not believe that this concern is warranted. Moreover, most contracts involving guard employees contain arbitration and no-strike clauses which would prohibit sympathy strikes. These clauses would continue to be included in contracts for guard employees since these employees are particularly vulnerable to replacement during strikes and have, therefore, sought the protection of arbitration.

3. Mandatory Injunction. CEA, Commerce and Labor all agree that the law should be amended to require the NLRB to seek preliminary injunctions against discriminatory discharges which are committed prior to the execution of an initial contract.

Labor would also require mandatory injunctions for both employer and union refusals to bargain. Such an injunction does not impose any penalty nor does it moot any legal objections which the parties may have to allegations of any wrongdoing. The injunction does not require the parties to sign a contract or to pay out any money. It simply directs them to meet and confer.

There was some concern expressed that an injunction would limit an employer's opportunity to obtain judicial review of a unit determination made by the Board. This issue would, of course, only arise where there is a first contract. Moreover, as already indicated, the injunction would not moot either the employer's objection or the subsequent legal substantive proceedings. In addition, an injunction is only issued by a court which will not grant the Board's request until after a hearing at which the objecting party can raise legal challenges. Typically, the court will grant an injunction only if there is "reasonable cause to believe" that an unlawful refusal to bargain has occurred. Thus, even at this early stage, the objecting party has a chance to convince the court that the Board's conclusions are clearly wrong. The party would also have a full opportunity to present its arguments when the Board's decision is reviewed by the courts.

Finally, it should be noted that a failure to grant a preliminary injunction for a refusal to bargain can do irreparable harm to the union and to the employees. If an employer could refuse to bargain until the completion of prolonged legal proceedings, union support among the employees could be severely eroded because of the union's obvious ineffectiveness. Even after a favorable court decision, it might not be easy for the union to restore confidence among the employees. Where a balance has to be struck prior to final court review between the rights of two parties, that balance should favor the party who has been judged to be legally correct by an administrative agency after full opportunity to consider the views of both sides.

4. Foreign Flags. It was agreed to omit any provision which would permit unions to attempt to organize foreign flagships which are American owned and which have their primary contacts with the United States. It was suggested, however, that the Presidential Message indicate a concern over foreign flags and the possibility of changes in the tax law.

5. Economic Strikers. No agreement was reached on this issue. Labor believes strongly that its proposed amendment provides crucial employment safeguards in the limited context of a first contract situation when most unions representing non-craft workers are relatively weak. In this connection, it should be noted that strike settlements generally include a provision guaranteeing strikers their previous jobs. It is expected that this provision would have its largest impact in the organization of hotel, motel and restaurant workers, retail workers and maintenance employees. The provision would not have a substantial impact on employment practices. Those few employers who choose to operate during a strike would still be able to hire temporary replacements and continue production. These replacements would almost always be considered probationary employees and would thus normally be subject, even without this provision, to termination during the probationary period. The law currently prohibits the replacement of employees who are striking because of unfair labor practices. Most strikes, however, are for economic reasons and it would be difficult to prove any unfair labor practices.

Both CEA and Commerce oppose this provision. CEA believes that the provision will induce more strikes and will result in larger wage increases, although it cannot estimate how substantial these increases will be. Commerce opposes the provision on the ground that it would give unions an additional economic weapon.

DEPT. OF COMMERCE COMMENTS
7/8/77

UNITED STATES DEPARTMENT OF COMMERCE
The Assistant Secretary for Policy
Washington, D.C. 20230

July 8, 1977

MEMORANDUM FOR Stu Eizenstat

From: Jerry J. Jasinowski

Subject: Labor Law Reform

We have reviewed the Department of Labor's draft memorandum (7/8/77) on the 5 outstanding issues with respect to labor law reform and have the following comments:

1. Mandatory injunctions

The Department of Commerce recognizes that in a limited number of instances employers refuse to bargain in good faith and delay unnecessarily the bargining process. The NLRA now gives the Board the discretionary authority to seek preliminary injunctions in cases of refusal to bargain. It is true that the Board has exercised this discretionary power only rarely. Rather than make the seeking of preliminary injunctions mandatory and putting many more collective bargaining cases into the courts, Commerce would prefer that the President strongly encourage the Board to use its existing discretionary powers.

If the proposed change were enacted, the work load on the Board, the courts and on business would be substantially increased by forcing the Board and the employer to present detailed arguments for and against the issuance of the injunction whether it is justified or not. We are concerned about making a statutory change until it has been demonstrated that the same objective cannot be achieved through more aggressive Board action.

2. Economic strikers

The Department of Commerce has two principal concerns about this provision: that it will reduce economic efficiency and that it may disturb the delicate balance between management and

labor rights in the collective bargaining process.

First the guarantee of job replacement is likely to lead to greater first contract work stoppages. Although it is difficult to estimate how many more lost work days would result from the economic striker provision, the effect would be substantial, especially in the South. In addition, the guarantee of a return job might also lead labor to negotiate a greater wage increase in the first contract to more fully close the gap between union and non-union wages. While closing this gap is a desirable objective, making this adjustment in one step has inflationary implications.

Finally, the Department recognizes that a balance has evolved over the years between the rights of management and labor. Industry strongly feels that current law requires both management and labor to take risks in a strike situation and that requiring an employer to give an employee his job back at the end of a strike significantly reduces the risk that labor incurs. Given the other changes in labor law which this Administration has agreed to support, Commerce questions whether accepting this additional provision will not significantly alter the existing balance.

THE WHITE HOUSE
WASHINGTON

July 13, 1977

The Vice President
Stu Eizenstat
Bob Lipshutz
Frank Moore
Jack Watson
Landon Butler
Bert Lance
Charlie Shultze

For your information and appropriate handling.

Rick Hutcheson

RE: LABOR LAW REFORM

THE WHITE HOUSE

WASHINGTON

July 11, 1977

Stu
F

MEMORANDUM FOR: THE PRESIDENT

FROM: STU EIZENSTAT
BILL JOHNSTON

SUBJECT: Labor Law Reform

BACKGROUND

Last week you approved 8 of the 13 labor law reforms outlined in my memo to you (copy attached). You indicated a preference for a message to Congress, rather than an Administration bill. You asked for more information on the other 5 issues and instructed Landon and me to work out acceptable language for the message with CEA and Commerce.

We have met twice with Charlie Schultze, Ray Marshall, and representatives of the Commerce Department. Along with Landon and Hamilton, we have also met again with representatives of the AFL-CIO. We have persuaded the unions to agree to the message strategy you suggested.

The items slated for inclusion in the message are:

- Increase the Board from 5 to 7.
- Summary affirmance of ALJ decision by 2-member panels.
- Time limits on elections (exact periods to be worked out).
- Rule-making to codify Board precedents.
- Debarment from federal contracts for willful violators.
- Double back pay for those unlawfully discharged.
- Expedited enforcement of Board orders.
- Giving the Board power to require employers to pay workers for their estimated wage loss for the period during which the employer refused to bargain. (You approved this verbally in our meeting July 1)

OUTSTANDING ISSUES

On four remaining items there is still disagreement. One strategy we discussed would be to include some or all of these measures in testimony by Ray Marshall, rather than in your message. This would give the unions some support but would, to some extent, separate you personally from the issues.

The unions consider items 1 and 2 to be of greatest importance among the remaining items.

1) Equal Access

You expressed great concern that any provision which appeared to compromise employer property rights would invite conservative opposition which could doom the whole bill.

The Labor Department has proposed alternative language seeking to minimize this danger. Under their proposal, the Board would promulgate rules which would assure that if an employer addressed employees on company time or property regarding issues relating to representation by a union, then the employees would be guaranteed an "equal opportunity to obtain information concerning such issues" from the union. This "equal opportunity" would be subject to reasonable conditions including due regard for the needs of the employer to maintain continuity of production. This could be phrased even more clearly in terms of the employee's right to equally balanced information - so that if he is addressed on company premises by the employer, "the employee shall also be afforded the equal opportunity to obtain information" from the unions on such issues.

This formulation casts the issue in terms of employees rights to information, and avoids mention of property rights. Labor believes, and I agree, that it would be more difficult for opponents to criticize or sloganeer against a provision couched in these terms. Since this issue arouses intense and irrational antagonisms, however, there is still the danger that any mention of union rights to equal opportunity will meet strong emotional opposition.

Commerce and CEA have no objection to this provision, feeling that it primarily involves political rather than substantive judgments.

While I recognize the dangers in this provision, I recommend that you accept the Labor Department's modified language. This is apparently organized labor's highest priority among the outstanding issues.

A. Presidential Message

Approve_____ Disapprove_____ Comment_____

B. Marshall Testimony

Approve ✓ Disapprove_____ Comment_____

2) Economic Strikers

Currently if a union goes out on strike over purely economic issues, the employer has a right to hire permanent replacements. (Such replacements cannot be hired in strikes called over unfair labor practices). When the economic strike is over, the striking employees have a right to any new job openings, but they do not the right to displace the strikebreakers.

The Labor Department proposes to change this rule to allow employees who strike over economic issues in bargaining over an initial contract to return to their old jobs when the strike is over, even if this means that the replacement workers must be fired.

The Labor Department believes strongly that its proposed amendment provides crucial employment safeguards in the limited context of a first contract situation when most unions are relatively weak. The Department notes that strike settlementsgenerally include a provision guaranteeing strikers their previous jobs. They predict that this provision would have its largest impact in the organization of hotel, motel and restaurant workers and maintenance employees.

Labor also argues that the provision would not have a substantial impact on employment practices. Those few employers who choose to operate during a strike would still be able to hire temporary replacements and continue production. These replacements would almost always be considered probationary employees and would thus normally be subject to termination, even without this provision if the strike ended before the probationary period was over.

The Commerce Department and CEA object to this change. They believe that it could increase inflation and lead to increased work stoppages.

They fear that a guarantee of job replacement is likely to make strikes more likely in first contract situations. While they concede that it is difficult to quantify the number of additional lost work days due to increased strikes, Commerce believes that the number would be substantial, especially in the South.

CEA and Commerce also argue that the guarantee of a return to the job would give labor a weapon in a first contract situation that would not be available in subsequent negotiations. This could encourage unions to seek greater wage gains in the first contract, with inflationary consequences.

Finally, the Department of Commerce argues that this change could upset the balance that has grown up over the years in labor-management relations. Industry feels strongly that current law requires both management and labor to take risks in a strike situation. Requiring an employer to give an employee his job back at the end of a strike significantly reduces the risk that labor incurs, and increases the difficulty that employers would have in hiring replacement workers. Given the other changes in labor law which the Administration has agreed to support, Commerce questions whether accepting this additional provision will not significantly alter the existing balance.

The concerns expressed by Commerce and CEA have persuaded me that we should not propose this change without further study of its impacts.

A. Presidential Message

Approve_____ Disapprove ✓ Comment_____

B. Marshall Testimony

Approve_____ Disapprove ✓ Comment_____

3) Guards

You were concerned about the need to have loyal employees to protect the plant.

The Labor Department points out that guards are now often unionized, and that these unions are now sometimes affiliated with the UAW and the AFL-CIO. Under present law however, these guard unions cannot be certified by the NLRB if they are affiliated with non-guard unions. Thus guard unions must either be independent, or they are not fully protected by NLRB rules and procedures.

The proposed change would allow guard unions to form these affiliations without losing NLRB protection. Under the Labor Department's modified proposal, a union could not represent guards at a plant if its national or international division represented non-guards at that plant. This will have the effect of allowing separate AFL-CIO unions to represent guards and non-guards at one plant.

Commerce has no objection to this proposal.

CEA is concerned that the affiliation of guard unions with non-guard unions could increase the likelihood of sympathy strikes or other job actions by guards during times of labor unrest. The Labor Department believes that this is unlikely. They argue that sympathy strikes are as likely when workers are organized and unaffiliated as when they are affiliated. They point out that most contracts with guard unions contain no-strike and arbitration clauses.

I support this proposal, modified as the Labor Department suggests to prevent guards and non-guards at the same plant from being represented by the same national or international union. This provision will not in my judgment, compromise the guard protection available to employers.

A. Presidential Message

Approve_____ Disapprove_____ Comment_____

B. Marshall Testimony

Approve ✓ Disapprove_____ Comment_____

4) Mandatory Injunctions for Unlawful Dismissal and Refusal to Bargain

You questioned whether these injunctions should be mandatory or discretionary as the law now allows.

Commerce, CEA and Labor agreed that preliminary injunctions should be mandated in cases of alleged unlawful discharge.

Labor argues that preliminary injunctions should also be required in cases of alleged refusal to bargain after an expedited first election. They argue that an injunction does not involve any penalties or moot any legal issues. Its application is limited to cases in which the Board had ordered an expedited election--those cases in which the representation issues are relatively straightforward. It does not require the parties to sign a contract, but merely directs them to meet and confer.

In addition, they point out that these injunctions would be issued by a court following a legal hearing. The courts will refuse to grant these injunctions unless they find probable cause to believe that unlawful conduct has taken place. Moreover, the NLRB would not even seek the injunctions until its own investigators had ascertained that there was probable cause to suspect a violation.

Finally the Labor Department notes that failure to grant a preliminary injunction for refusal to bargain can do irreparable harm to the union and its employees. If an employer could refuse to bargain until the completion of prolonged legal hearings, the union's support among the employees could be severely eroded because of the unions obvious ineffectiveness.

The Commerce Department opposes making preliminary injunctions mandatory in cases of refusal to bargain. They argue that rather than making these injunctions mandatory and putting more collective bargaining cases onto the courts, that the Board should be strongly encouraged to use its existing discretionary powers.

If the proposed change were enacted, Commerce argues, the work load on the Board, in the courts, and on business would be substantially increased. The Board and the employer would be forced to present detailed arguments for and against the issuance of the injunctions whether they were justified or not.

I believe that at a minimum the Board should be required to seek preliminary injunctions in cases of unlawful discharge, as all agencies agree. These mandatory injunctions would help redress the imbalance that now exists in the use of injunctions. Under current law mandatory injunctions are most often used against unfair union labor practices, while the discretionary injunctions which may be used against employers are seldom sought.

only

A. Presidential Message

Approve ✓ Disapprove _____ Comment _____

B. Marshall Testimony

Approve _____ Disapprove _____ Comment _____

I also believe that the Board should be required to seek preliminary injunctions in cases of refusal to bargain after an expedited first election. This injunction does nothing more than to require the company to sit down and talk to the union.

A. Presidential Message

Discretionary seems adequate

Approve _____ Disapprove ✓ Comment _____

B. Marshall Testimony

Approve _____ Disapprove _____ Comment _____

C. Encourage the Board to use its Discretionary Powers in Cases of Refusal to Bargain. (Commerce supports)

Approve ✓ Disapprove _____ Comment _____

5) Foreign Flag Ships

One item about which you had concern, the inclusion of foreign flag ships under the NLRA, has been dropped from consideration as an Administration proposal (The AFL-CIO intends, however, to continue to seek passage of this change.) We, and all the agencies involved, agreed that there were too many problems with this proposal to include it in our message. There was interagency agreement that the message should mention the need to take action to encourage repatriation of American owned ships to American operation.

Approve ✓ Disapprove _____ Comment _____

IMPLEMENTATION

Pending your approval, we have tentatively planned the following execution of your instructions. A message would be sent to Congress on July 15 to coincide with the introduction by Congressman Thompson of labor law reform legislation. The AFL-CIO will probably want this legislation to contain all 13 points even if we do not support them. Our message would state the need for labor law reform, would endorse the specific concepts which you support, and would express a willingness to work with Congress on other changes that may be needed. The Labor Department would subsequently testify on pending labor law reform bills. On issues not covered by our message, or on which you had not specifically authorized Ray to support the measure, the Department would express concern for existing problems, but would take no position pending further study.

NO

We suggest that in order to draw some attention to this message, and to give some credit to Congressional leaders who will be most involved in its passage, you may wish to meet briefly with Senators Javits and Williams, and with Representative Thompson on Friday July 15.

THE WHITE HOUSE

WASHINGTON

Date: July 12, 1977 MEMORANDUM

FOR ACTION:
The Vice President
Bob Lipshutz concur
Jack Watson per Jay Moore
Landon Butler NC
Bert Lance
Charlie Schultze NC

FOR INFORMATION:

Frank Moore

FROM: Rick Hutcheson, Staff Secretary

SUBJECT: Eizenstat/Johnston memo dated 7/11/77 re Labor Law Reform.

NOTE: MESSAGE TENTATIVELY SCHEDULED TO GO TO HILL ON FRIDAY, JULY 15, 1977.

YOUR RESPONSE MUST BE DELIVERED TO THE STAFF SECRETARY BY:

TIME: 8:00 A.M.

DAY: Wednesday

DATE: July 13, 1977

NO EXTENSIONS

ACTION REQUESTED:

_X_ **Your comments**

Other:

STAFF RESPONSE:

____ **I concur.** ____ **No comment.**

Please note other comments below:

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately. (Telephone, 7052)

WASHINGTON

Date: July 12, 1977

MEMORANDUM

FOR ACTION:
The Vice President
Bob Lipshutz
Jack Watson
Landon Butler
Bert Lance
Charlie Schultze

FOR INFORMATION:

Frank Moore

FROM: Rick Hutcheson, Staff Secretary

SUBJECT: Eizenstat/Johnston memo dated 7/11/77 re Labor Law Refo

NOTE: MESSAGE TENTATIVELY SCHEDULED TO GO TO HILL ON FRIDAY, JULY 15, 1977.

YOUR RESPONSE MUST BE DELIVERED TO THE STAFF SECRETARY BY:

TIME: 8:00 A.M.

DAY: Wednesday

DATE: July 13, 1977

NO EXTENSIONS

ACTION REQUESTED:

__X__ Your comments

Other:

STAFF RESPONSE:

____ I concur. ____ No comment.

Please note other comments below:

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately. (Telephone, 7052)

THE WHITE HOUSE

WASHINGTON

July 11, 1977

MEMORANDUM FOR: THE PRESIDENT

FROM: STU EIZENSTAT
BILL JOHNSTON

SUBJECT: Labor Law Reform

BACKGROUND

Last week you approved 8 of the 13 labor law reforms outlined in my memo to you (copy attached). You indicated a preference for a message to Congress, rather than an Administration bill. You asked for more information on the other 5 issues and instructed Landon and me to work out acceptable language for the message with CEA and Commerce.

We have met twice with Charlie Schultze, Ray Marshall, and representatives of the Commerce Department. Along with Landon and Hamilton, we have also met again with representatives of the AFL-CIO. We have persuaded the unions to agree to the message strategy you suggested.

The items slated for inclusion in the message are:

- Increase the Board from 5 to 7.
- Summary affirmance of ALJ decision by 2-member panels.
- Time limits on elections (exact periods to be worked out).
- Rule-making to codify Board precedents.
- Debarment from federal contracts for willful violators.
- Double back pay for those unlawfully discharged.
- Expedited enforcement of Board orders.
- Giving the Board power to require employers to pay workers for their estimated wage loss for the period during which the employer refused to bargain. (You approved this verbally in our meeting July 1)

OUTSTANDING ISSUES

On four remaining items there is still disagreement. One strategy we discussed would be to include some or all of these measures in testimony by Ray Marshall, rather than in your message. This would give the unions some support but would, to some extent, separate you personally from the issues.

The unions consider items 1 and 2 to be of greatest importance among the remaining items.

1) Equal Access

You expressed great concern that any provision which appeared to compromise employer property rights would invite conservative opposition which could doom the whole bill.

The Labor Department has proposed alternative language seeking to minimize this danger. Under their proposal, the Board would promulgate rules which would assure that if an employer addressed employees on company time or property regarding issues relating to representation by a union, then the employees would be guaranteed an "equal opportunity to obtain information concerning such issues" from the union. This "equal opportunity" would be subject to reasonable conditions including due regard for the needs of the employer to maintain continuity of production. This could be phrased even more clearly in terms of the employee's right to equally balanced information - so that if he is addressed on company premises by the employer, "the employee shall also be afforded the equal opportunity to obtain information" from the unions on such issues.

This formulation casts the issue in terms of employees rights to information, and avoids mention of property rights. Labor believes, and I agree, that it would be more difficult for opponents to criticize or sloganeer against a provision couched in these terms. Since this issue arouses intense and irrational antagonisms, however, there is still the danger that any mention of union rights to equal opportunity will meet strong emotional opposition.

Commerce and CEA have no objection to this provision, feeling that it primarily involves political rather than substantive judgments.

While I recognize the dangers in this provision, I recommend that you accept the Labor Department's modified language. This is apparently organized labor's highest priority among the outstanding issues.

A. Presidential Message

Approve_____ Disapprove_____ Comment_____

B. Marshall Testimony

Approve_____ Disapprove_____ Comment_____

2) Economic Strikers

Currently if a union goes out on strike over purely economic issues, the employer has a right to hire permanent replacements. (Such replacements cannot be hired in strikes called over unfair labor practices). When the economic strike is over, the striking employees have a right to any new job openings, but they do not the right to displace the strikebreakers.

The Labor Department proposes to change this rule to allow employees who strike over economic issues in bargaining over an initial contract to return to their old jobs when the strike is over, even if this means that the replacement workers must be fired.

The Labor Department believes strongly that its proposed amendment provides crucial employment safeguards in the limited context of a first contract situation when most unions are relatively weak. The Department notes that strike settlements generally include a provision guaranteeing strikers their previous jobs. They predict that this provision would have its largest impact in the organization of hotel, motel and restaurant workers and maintenance employees.

Labor also argues that the provision would not have a substantial impact on employment practices. Those few employers who choose to operate during a strike would still be able to hire temporary replacements and continue production. These replacements would almost always be considered probationary employees and would thus normally be subject to termination, even without this provision if the strike ended before the probationary period was over.

The Commerce Department and CEA object to this change. They believe that it could increase inflation and lead to increased work stoppages.

They fear that a guarantee of job replacement is likely to make strikes more likely in first contract situations. While they concede that it is difficult to quantify the number of additional lost work days due to increased strikes, Commerce believes that the number would be substantial, especially in the South.

CEA and Commerce also argue that the guarantee of a return to the job would give labor a weapon in a first contract situation that would not be available in subsequent negotiations. This could encourage unions to seek greater wage gains in the first contract, with inflationary consequences.

Finally, the Department of Commerce argues that this change could upset the balance that has grown up over the years in labor-management relations. Industry feels strongly that current law requires both management and labor to take risks in a strike situation. Requiring an employer to give an employee his job back at the end of a strike significantly reduces the risk that labor incurs, and increases the difficulty that employers would have in hiring replacement workers. Given the other changes in labor law which the Administration has agreed to support, Commerce questions whether accepting this additional provision will not significantly alter the existing balance.

The concerns expressed by Commerce and CEA have persuaded me that we should not propose this change without further study of its impacts.

A. Presidential Message

Approve_____ Disapprove_____ Comment_____

B. Marshall Testimony

Approve_____ Disapprove_____ Comment_____

3) Guards

You were concerned about the need to have loyal employees to protect the plant.

The Labor Department points out that guards are now often unionized, and that these unions are now sometimes affiliated with the UAW and the AFL-CIO. Under present law however, these guard unions cannot be certified by the NLRB if they are affiliated with non-guard unions. Thus guard unions must either be independent, or they are not fully protected by NLRB rules and procedures.

The proposed change would allow guard unions to form these affiliations without losing NLRB protection. Under the Labor Department's modified proposal, a union could not represent guards at a plant if its national or international division represented non-guards at that plant. This will have the effect of allowing separate AFL-CIO unions to represent guards and non-guards at one plant.

Commerce has no objection to this proposal.

CEA is concerned that the affiliation of guard unions with non-guard unions could increase the likelihood of sympathy strikes or other job actions by guards during times of labor unrest. The Labor Department believes that this is unlikely. They argue that sympathy strikes are as likely when workers are organized and unaffiliated as when they are affiliated. They point out that most contracts with guard unions contain no-strike and arbitration clauses.

I support this proposal, modified as the Labor Department suggests to prevent guards and non-guards at the same plant from being represented by the same national or international union. This provision will not in my judgment, compromise the guard protection available to employers.

A. Presidential Message

Approve_____ Disapprove_____ Comment_____

B. Marshall Testimony

Approve_____ Disapprove_____ Comment_____

4) Mandatory Injunctions for Unlawful Dismissal and Refusal to Bargain

You questioned whether these injunctions should be mandatory or discretionary as the law now allows.

Commerce, CEA and Labor agreed that preliminary injunctions should be mandated in cases of alleged unlawful discharge.

Labor argues that preliminary injunctions should also be required in cases of alleged refusal to bargain after an expedited first election. They argue that an injunction does not involve any penalties or moot any legal issues. Its application is limited to cases in which the Board had ordered an expedited election--those cases in which the representation issues are relatively straightforward. It does not require the parties to sign a contract, but merely directs them to meet and confer.

In addition, they point out that these injunctions would be issued by a court following a legal hearing. The courts will refuse to grant these injunctions unless they find probable cause to believe that unlawful conduct has taken place. Moreover, the NLRB would not even seek the injunctions until its own investigators had ascertained that there was probable cause to suspect a violation.

Finally the Labor Department notes that failure to grant a preliminary injunction for refusal to bargain can do irreparable harm to the union and its employees. If an employer could refuse to bargain until the completion of prolonged legal hearings, the union's support among the employees could be severely eroded because of the unions obvious ineffectiveness.

The Commerce Department opposes making preliminary injunctions mandatory in cases of refusal to bargain. They argue that rather than making these injunctions mandatory and putting more collective bargaining cases onto the courts, that the Board should be strongly encouraged to use its existing discretionary powers.

If the proposed change were enacted, Commerce argues, the work load on the Board, in the courts, and on business would be substantially increased. The Board and the employer would be forced to present detailed arguments for and against the issuance of the injunctions whether they were justified or not.

I believe that at a minimum the Board should be required to seek preliminary injunctions in cases of unlawful discharge, as all agencies agree. These mandatory injunctions would help redress the imbalance that now exists in the use of injunctions. Under current law mandatory injunctions are most often used against unfair union labor practices, while the discretionary injunctions which may be used against employers are seldom sought.

A. Presidential Message

Approve_____ Disapprove_____ Comment_____

B. Marshall Testimony

Approve_____ Disapprove_____ Comment_____

I also believe that the Board should be required to seek preliminary injunctions in cases of refusal to bargain after an expedited first election. This injunction does nothing more than to require the company to sit down and talk to the union.

A. Presidential Message

Approve_____ Disapprove_____ Comment_____

B. Marshall Testimony

Approve_____ Disapprove_____ Comment_____

C. Encourage the Board to use its Discretionary Powers in Cases of Refusal to Bargain. (Commerce supports)

Approve_____ Disapprove_____ Comment_____

5) Foreign Flag Ships

One item about which you had concern, the inclusion of foreign flag ships under the NLRA, has been dropped from consideration as an Administration proposal (The AFL-CIO intends, however, to continue to seek passage of this change.) We, and all the agencies involved, agreed that there were too many problems with this proposal to include it in our message. There was interagency agreement that the message should mention the need to take action to encourage repatriation of American owned ships to American operation.

Approve_____ Disapprove_____ Comment_____

IMPLEMENTATION

Pending your approval, we have tentatively planned the following execution of your instructions. A message would be sent to Congress on July 15 to coincide with the introduction by Congressman Thompson of labor law reform legislation. The AFL-CIO will probably want this legislation to contain all 13 points even if we do not support them. Our message would state the need for labor law reform, would endorse the specific concepts which you support, and would express a willingness to work with Congress on other changes that may be needed. The Labor Department would subsequently testify on pending labor law reform bills. On issues not covered by our message, or on which you had not specifically authorized Ray to support the measure, the Department would express concern for existing problems, but would take no position pending further study.

We suggest that in order to draw some attention to this message, and to give some credit to Congressional leaders who will be most involved in its passage, you may wish to meet briefly with Senators Javits and Williams, and with Representative Thompson on Friday July 15.

THE PRESIDENT HAS SEEN.

THE WHITE HOUSE

WASHINGTON

June 30, 1977

Stu - I prefer a message endorsing concepts and principles. We can deal with specifics later. I'll have to learn more - J

MEMORANDUM FOR: THE PRESIDENT

FROM: STU EIZENSTAT Stu

SUBJECT: Labor Law Reform

BACKGROUND

The AFL-CIO and the U.A.W. have declared that labor law reform is this year's top legislative priority. The unions feel that the 1974 Taft-Hartley Act, and particularly its rules governing union organizing efforts, unfairly favors management.

A bill, H.R. 77, embodying some of the union-backed reforms was introduced by Congressman Thompson in January. During the spring the AFL-CIO drafted a much more extensive bill. After several rounds for consultation with the Labor Department the AFL-CIO agreed to a much more modest set of reforms outlined below.

Three highly controversial proposals were deleted during this round of consultations - a provision to repeal 14B, a provision that would have allowed certification of a union as a bargaining agent without an election in some cases, and a provision that would have required employers taking over a business to honor the old union contract. The AFL-CIO accepted these major compromises, along with a number of lesser ones, because they very much want Administration backing for their bill. Without our active support it is doubtful that any labor law reform bill can pass Congress. Even if the unions do not receive our support, however, they expect to introduce and push this package of reforms very soon. They have asked for a decision on these reforms by July 7.

ANALYSIS

The effect of this set of proposals is generally to streamline the labor laws and to make it easier for unions to organize. Under current law, companies can often use procedural delays to weaken union organizing efforts. The law's remedies are so weak that in some cases outright flaunting of the law is

less costly than collective bargaining and the subsequent wage settlements. The package focuses on procedural changes and speed-ups, strengthened sanctions against employers guilty of unfair labor practices, and coverage expansions.

The business community argues that the changes will tip the current balance in labor-management relations too much toward labor. I disagree. I have met on three occasions with leaders from the Business Roundtable - Chamber of Commerce - National Association of Manufacturers to specifically discuss labor law reform. While, of course, they would prefer to see no change in the labor laws, many of their specific criticisms have been dealt with in our revisions.

A coalition of business groups intends not only to lobby against these proposals, but to introduce their own amendments to the labor laws, presumably ones intended to favor employers. It is likely that this issue will develop into a tough battle in Congress, with final passage delayed until next year, if at all.

Because labor law reform is such a high priority with organized labor, we and the Labor Department have cooperated closely with the unions in the development of this package. At the same time the Labor Department has tried to limit the proposals to measures that remedy actual inequities in the law, as opposed to simply shifting its balance toward labor.

Prior to submitting these proposals from the Labor Department to you I have circulated them to the Departments of Commerce, Justice and Treasury, and to CEA, OMB and the Vice President. ~~Their comments are attached, and~~ the analysis below reflects their concerns.

OPTIONS

I believe that there are three possible strategies:

1) Neutrality We could take a hands off attitude on the grounds that it is not worth investing our political capital in this potentially bloody battle. The unions would consider this tantamount to opposition.

2) A Labor Law Reform Message As in our airline message, we could endorse the concepts and principles of labor law reform without detailing them or preparing legislative language.

3) A Message Together with an Administration Bill The Vice President, Ray Marshall and I support this course. If we adopt this course we should be able to extract a much greater measure of cooperation from the AFL-CIO over the course of the next year.

It is unlikely that the AFL-CIO will accept a severely pared down Administration bill, since they have conceded so much already in their negotiations with the Labor Department. Therefore, if you cannot support most of this package, the message or neutrality strategy is probably preferable. If you agree with most of these reforms, however, then an Administration bill is the option with the most political benefit.

It is difficult to overestimate the importance of this matter in terms of our future relationship with organized labor. Because of budget constraints and fiscal considerations, we will be unable to satisfy their desires in many areas requiring expenditure of government funds. This is an issue without adverse budget considerations, which the unions very much want. I think it can help cement our relations for a good while.

Following are the "bare bones" provisions now remaining in the Labor Department's package of amendments to the National Labor Relations Act (NLRA). Secretary Marshall strongly recommends all of these remaining proposals.

PROPOSED REFORMS

Not all agencies commented on each of the reforms. All specific comments of the agencies surveyed are reflected. The Vice President, the Secretary of the Treasury and the Attorney General expressed non-specific approval of the whole package.

I. Expedited Procedures

A. Board Membership

The number of board members would be increased from five to seven (budget costs $2 million). This should enable the board to better handle its growing back log of cases along with the substantial additional powers proposed in these reforms. Since the Board divides its work among small panels of its members, more members would allow more panels to operate. The American Bar Association has recommended an increase to 9 members.

OMB opposes this increase on the grounds that the Board may be able to increase its productivity with better utilization of existing resources.

Commerce and CEA do not oppose this change. DOL supports it.

I believe that the Board should be increased to 7 members.

Yes ✓ No _____ Comment _____

B. Summary Affirmance of Administrative Law Judge Decisions

The decrees of the Administrative Law Judges (ALJs) would be affirmed in simpler cases by 2-member panels of the Board, rather than by the current three-member panels. Currently, the 94 ALJs across the country make all initial decisions regarding complaints of unfair labor practices. These decisions are in the form of recommendations to the Board in Washington, and do not become final until the Board acts on them. The Board takes an average of 120 days to review these decisions, resolving about 25% in less than 109 days, but taking more than 221 days to decide on the most complex 25%. About 2/5 of all ALJ decisions are totally or partially reversed by the Board. By allowing the Board to delegate its decision making authority to a greater degree, this reform aims at speeding up the review process. This

procedure is consistent with those used by the Courts of Appeal in their summary affirmance procedure. The NLRB could determine which more complex cases would be heard by the full Board.

OMB does not support this change on the grounds that it would have little substantial impact. They prefer the procedure of allowing the ALJ's ruling to become final unless the Board grants review. This procedure was embodied in the H.R. 77 but was modified by the Labor Department in the current plan because of the high rate of reversals of ALJ decisions by the Board. The business community strongly objected to delegating as much authority to the ALJs as OMB proposes. Thus the proposal as it is, is a more moderate approach than reflected in H.R. 77.

CEA and Commerce have no objection to the 2-member panel affirmation. DOL supports this change.

I support the 2-member panel approach.

Yes ✓ No_____ Comment_____ F

C. Elections

1) Time Limits

The Labor Department and our staff succeeded in moving the AFL-CIO off of its original position that no election would be necessary, upon a showing of certain evidence that a majority of workers wished to join a union.

As the provision now reads, in cases in which a majority of employees in an appropriate unit have signed authorization cards, an election would be required within 15 days of the filing of a petition with the Board (25 days for units larger than 250 employees.) All other elections would be required within 45 days, except for those of "exceptional novelty or complexity" which would have to be held within 75 days. In complex cases in which the Board could not resolve the issues by the time of the election, the election would be held anyway. If the subsequent decision changed the unit or eligibility rules under which the election was held a new election would be called.

Currently the median time for holding an uncontested election is 56 days, while the median for contested elections in which the issues are resolved at the regional level is 75 days. These two kinds of cases comprise 99% of all elections. For the 1% of cases in which the issues must be resolved by the Board, the median time before an election is 275 days.

The Labor Department argues that delay almost always works in favor of an employer resisting unionization. They believe that under current law employers can unfairly delay elections by contesting such things as the appropriateness of the unit or the eligibility of certain employees to vote in the election. Time limits would eliminate the incentive to frivolously contest elections.

The Chairman of the NLRB has indicated that the proposed time limits are feasible.

CEA, OMB and Commerce all feel that the time limits may be too inflexible. They propose targets rather than limits.

I recommend that some specific time limits be adopted. To satisfy concerns that the limits are too restrictive we could consider a modest lengthening of the periods. But the principle that an election should be held after a fixed time is important and I support its inclusion in this legislation.

Yes ✓ No _____ Comment principle ok J

2) Unit Determination by Rule-Making

The legislation would instruct the Board to promulgate rules governing appropriate units for collective bargaining and for eligibility to vote in union elections.

Currently the Board resolves most of these issues on a case-by-case basis. Greater codification of the rules could cut down on delay and reduce the uncertainties in the law. This would be consistent with the changes other agencies have been encouraged to adopt, moving from time-consuming, case-by-case adjudicative decision-making to more clearly defined and speedier rule-making.

OMB does not support this change because they believe that everything that could be covered by a rule in this area is already covered by an NLRB precedent. The Department of Labor feels, however, the NLRB precedents are inconsistently applied, and that rules would insure fairer and faster application of Board policies. Commerce supports rulemaking, but believes that it should not be tied to time limits for elections (Commerce's concern has been dealt with in the most recent draft).

I support this rulemaking procedure.

Yes ✓ No_____ Comment_____

3) Equal Opportunity to Address Employees

The Board would be instructed to issue regulations requiring that employers and employees have "equal assured opportunity" to address all employees during a union's organizing efforts. Depending on how the Board wrote these regulations, this could grant unions, in some cases, rights to go on company property to make their case.

Currently, unions seeking to address employees are generally limited to calling or visiting them in their homes, or to distributing literature outside plant gates. Employers have much greater access to employees, since they can make their case on company time and company property.

The AFL-CIO had proposed that the legislation itself grant equal rights of access to unions. Our procedure will give the Board the power to define the appropriate rules to govern union rights.

OMB supports this change in principle, but warns of definitional and enforcement problems with an "equal" standard. Schultze agrees with the principle but suggests "full opportunity" rather than "equal".. It should be noted that in cases in which an employer chooses not to make any case to his employees prior to a union election, a "full" standard might entail broader union rights than "equal".

Commerce supports this change in principle, but believes that it is very important to maintain private property rights. They urge that any legislative instruction to the Board specifically mention these property rights. The Department of Labor feels that the issue is not one of property rights versus union rights. They point out that under an "equal opportunity" standard that an employer could not be required to grant access to unions unless he used company time or property to argue against unionization. The controlling factor would be a decision by the employer.

This will be one of the most controversial aspects of this package. Unions should have a fair chance to make their case, but employers obviously also have rights to control their operations and to limit access to their facilities. Therefore we recommend that the Board be instructed to promulgate rules granting unions "equal assured opportunity to address employees prior to an election consistent with the employer's right to the reasonably unimpeded operation of his business." Our latest conversations with the AFL-CIO indicate that they would be willing to accept such a modification.

This will be the postcard campaign theme

Yes ? No ? Comment Property rights ? can kill entire bill

II. Strengthened Remedies Against Unfair Employer Labor Practices

A. Participation in Federal Contracts

Employers guilty of willfully violating a Board order enforced by a court decree would be debarred from participating in new federal contracts for three years. The Secretary of Labor could exempt a company from this penalty if he found it was in the national interest, or if the company was the sole source of a needed product. This remedy would apply only to cases involving coercion of employees or discrimination based on union membership. Currently there is no such provision in the law.

OMB supports this provision but argues that similar sanctions (i.e., large fines) should also apply to firms without federal contracts and to unions guilty of unfair labor practices. The Department of Labor argues that fines for other violators are inconsistent with the intent of this provision, which is simply to insure that federal dollars do not go to those who willfully

violate the nations laws. They point out that this sanction is used to enforce other federal laws (such as Davis-Bacon, Service Contracts, OFCC, etc.).

Commerce finds an automatic 3 year debarment objectionable. They would prefer to see all firms subject to penalties, and they believe that debarment should be lifted when a firm comes into compliance.

The Department of Labor argues that lifting the sanctions when a firm comes into compliance would allow a firm to circumvent the law. For example, a firm could fire workers for union activities and then later, when the NLRB threatened to cut off federal contracts, it could simply rehire them. The damage would already have been done however.

I agree with the Department of Labor that a 3 year debarment should be written into the law. If this period (which is standard in other debarment laws) is considered to long we could agree to compromise on a somewhat shorter period.

Yes ✓ No _____ Comment _____ I

B. Double Back Pay

Employees unlawfully discharged for union activity during the initial organizing period would be entitled to reinstatement and double back pay. This would not apply to any subsequent period.

Currently the Board has the authority to require reinstatement and back pay awards, but this award is based on back pay less the employee's interim earnings (the "mitigation of damage" rule). The result is lengthy proceedings to determine the amount of damages and interim earnings and an incentive for companies to contest and minimize these awards. Typically these back pay awards are quite small and are often delayed for years.

Double back pay computed without offsetting factors would greatly simplify and streamline this procedure.

OMB does not object to this change, if analysis supports this estimate of damages to the employee.

Commerce has no comment.

I support this change.

Yes ✓ No_____ Comment_____ F

C. Remedies for Refusal to Bargain for First Contract

The NLRA would be amended to authorize the Board to require companies found guilty of refusing to bargain in good faith for a first contract to recompense employees for the presumed loss of benefits during the unfair delay. This compensation would be the difference between the wages and fringes received by the employees during the delay and these benefits multiplied by the average percentage increase in all labor contract settlements signed during the delay, as measured by a standard BLS index. For example, if first contract settlements had averaged 8% in the period of delay, then the employer could be required to pay his employees a bonus of 8% of the pay they earned during the delay.

Currently employers in some cases simply refuse to bargain after the union wins an election, and then litigate the subsequent "order to bargain" issued by the Board. They prefer the legal costs to the higher settlements that might result from a collective bargaining agreement. This provision takes away this incentive to delay by litigation.

OMB has no objection in principle but wants to further analyze the choice of index and how it would be used. Commerce believes that the remedy gives the Board too much authority to determine wage rates. In practice the distinction between a rigid but legal bargaining stance and an illegal pattern of refusing to bargain is based partly on the Board's judgment. Commerce questions whether the government should be so deeply involved in these issues, and urges further study.

CEA has no objection.

I support this remedy. The Board would have to find a company guilty of refusing to bargain before imposing any penalties. Since this finding is based on a gross showing of a pattern of bad faith, I believe that there

are sufficient safeguards to protect companies. The Department of Labor points out that the strength of this remedy will tend to make the Board very judicious in its use.

Yes_____ No_____ Comment ?

D. Preliminary Injunctions

The Board would be required to seek preliminary injunctions (prior to the issuance of a formal complaint) against companies accused of refusing to bargain after expedited first elections, and against companies accused of illegally discharging an employee during the initial bargaining or organizing phase. This injunction would be issued only after a local investigation by NLRB officials revealed probable cause to suspect these violations had occurred.

Currently the Board is only required to seek injunctions prior to issuance of a complaint in cases of secondary boycotts, unlawful picketing, "hot-cargo" agreements, and coercion to join or bargain with a union. It has discretionary power to seek preliminary injunctions after a complaint is issued in other cases of labor law violation. It has used this discretionary power sparingly.

According to the Department of Labor the intent of existing preliminary injuction authority in the Board is to protect businesses against union practices which have a particularly deleterious impact on their operations. This new authority would recognize that certain unfair employer practices can have an equally deleterious effect on workers and unions.

OMB has no objection to this proposal. Commerce opposes on the ground that the NLRB already has sufficient power to seek injunctive relief. Commerce believes that it is undesirable to make it mandatory for the Board to seek preliminary injunctions in cases in which an employer is accused of refusing to bargain after an expedited election.

Members of the current Board are concerned that this change would increase the workload of the Board but the Chairman has assured us that this will not be unmanageable.

I believe the Board should be required to seek injunctive relief in cases of refusal to bargain and unlawful discharge. The requirement that the local Board make "probable cause" and "irreparable damage" findings insures that this provision would not be abused.

Yes_____ No_____ Comment ?

D. Expedited Enforcement of Board Orders

The Board would be required to file its orders with the Appeals Court within 30 days of a decision, if neither party appeals within this time limit. Upon receipt of the Board order by the Court the order would become final.

Presently there is no time limit for the Board to file its orders with the Court. In the past this had lead to some delay. Since this delay has notbeen largely cleared up through administrative action, this proposal will have little practical impact but will act as a statuatory guide to assure that the NLRB acts expeditiously.

No agencies object.

I support.

Yes ✓ No_____ Comment_____ F

III. Other Amendments

A. Foreign Flag Ships

American owned foreign flag ships would be brought under the NLRA jurisdiction, if the ships have more substantial contacts with American ports than with those of the nation of registry.

A 1962 Supreme Court ruling held that the NLRA did not cover workers on foreign flag ships, in the absence of a specific expression of Congressional intent. This proposal would overturn that ruling by providing a specific expression of Congessional intent.

OMB opposes this change, citing concerns about international agreements, and enforcement problems. Commerce is sympathetic to the goals of the change, but suggests study of the costs. State is (unofficially) opposed. Charlie Schultze suggests limiting its impact to ships whose home ports and base of operation is the U.S. This would exclude the flags of convenience ships but would catch, for example, the foreign flag fishing fleets based in San Diego. In practice such a distinction would be difficult to enforce and would invite subterfuges to avoid the law. It could also encourage some transfer of ships out of the country.

Applying the NLRA to foreign flag ships is primarily aimed at flag-of-convenience shippers, particularly the oil companies who escape American labor costs by hiring foreign crews to work on their foreign registered vessels. The business community warns that this change may have the impact of forcing multinational companies to divest themselves of their foreign flag ships, rather than reregistering them.

I believe that foreign flag ships should be brought under the NLRA. The danger of transfer outside the United States is small because on modern ships labor costs are generally a small fraction of shipping costs. This change will tend to encourage the repatriation of American shipping to our flag, consistent with our other policies in the maritime area.

Yes_____ No_____ Comment ?

B. Greater Protection for Guards

The proposal would repeal current restrictions on the organization and representation of guards.

Currently guards cannot be represented by a union that includes non-guards, and a guard union cannot be affiliated with an organization that admits employees other than guards. The practical effect of this is to require separate unions solely for guards and to prohibit these unions from affiliating with the AFL-CIO.

The Congressional intent of this provision was to insure that employers would have loyal employees to protect people and property in the event of a strike or labor unrest. Separate unions were thought to protect against a conflict of interest.

The Labor Department's proposal retains the prohibition against a single unit being the bargaining agent for both guards and non-guards at one location. But it would allow guards to join unions which have non-guard members, and it would allow guard unions to affiliate with non-guard unions. This should assure that the concerns prompting the current law are satisfied, without the meat-ax approach now employed.

OMB and CEA object to this change on the grounds that there is no demonstration of harm to guards under the current system. In the absence of such a demonstration they feel that the original justification of the restriction is still valid.

Commerce has no objection.

I support this change. Our proposal provides adequate safeguards against conflicts of interest or disloyalty by guards. It corrects a long-standing inequity which limits the freedom of guards to join unions of their own choosing.

Yes_____ No_____ Comment 7

D. Replacements for Economic Strikers

This proposal would allow workers involved in a first strike over economic issues to displace, at the end of the strike, strike breakers hired to replace them during the strike. This right would apply only to workers striking over an initial collective bargaining agreement.

Currently striking workers have the right to replace strike breakers only if the strike was called or prolonged because of an employer's unfair labor practices. In strikes that are purely over economic

issues the employer has the right to hire permanent replacements. This change would remove the danger of job loss for workers who go out on strike to obtain their initial contract.

OMB opposes this change on the ground that an employer should have the right to choose his workforce prior to reaching a first union contract. Commerce calls it a fundamental shift in labor law and asks for more information to analyze the issue.

I support this change proposed by the Labor Department. In negotiations for a first contract the union is usually very weak, with little allegiance from its members. It can seldom risk an economic strike if its members are aware they could lose their jobs. This right to reinstatement would not, of course involve any back pay.

Yes_____ No_____ Comment ?_____

U. S. DEPARTMENT OF LABOR
OFFICE OF THE SECRETARY
WASHINGTON

July 8, 1977

LABOR LAW REFORM

There have been extensive discussions with the Department of Labor, Department of Commerce and Council of Economic Advisers in the last week on the five points in the labor law reform package which were not specifically approved. The result of these discussions are as follows:

1. Equal Access. Commerce and CEA have no substantive objections to this proposal, although they agree, as does Labor, that it could become the basis of a post-card campaign. It was the consensus, however, that we might mitigate the efficacy of such a campaign by recasting the provision in terms of the employee's opportunity for information. The new language which we propose would not refer to the union's right of access to the employer's property, but rather to the employee's right to information. The provision would only apply where the employer chooses to address employees on its premises or during working hours while an organizing campaign is in progress. Finally, the language would specifically protect the employer's need to maintain continuity of production and employee discipline. The revised proposal would read as follows:

Section 6(b)(1). The Board shall, within 12 months after the effective date of this subsection, exercise its authority under subsection (a) of this section to implement the provisions of subsection (c)(6) of section 9 (including, but not limited to, rules (A) which shall, subject to reasonable conditions, including due regard for the needs of the employer to maintain the continuity of production, assure that if an employer or employer representative

addresses the employees on its premises or during working time on issues relating to representation by a labor organization during a period of time that employees are seeking representation by a labor organization, the employees shall be assured an equal opportunity to obtain information concerning such issues from such labor organization; (B) to facilitate . . .

2. Guards. The Department of Labor requests reconsideration of a modified provision permitting the organization of guards by unions which also represent nonguard employees or which are affiliated with such unions. Under current law, guards can be organized. The limitation imposed in 1947 is that unions representing guards cannot be certified by the Board (and thus entitled to use the Board's processes in order to protect its members) if they admit nonguard employees or are affiliated with a union which admits nonguard employees. Despite this provision, the more powerful unions continue to represent guards since such representation is not illegal and since these unions are not dependent on the Board's processes for protection. Thus, some 23,000 guards are currently organized by the Teamsters, United Steelworkers, Laborers and Service Employees International Union. In addition, guards are organized by independent unions (which can be certified); these independent unions were AFL-CIO unions prior to 1947. They are the United Plant Guard Association, which was once part of the UAW, and the International Guard Union, which was once part of the ILA. The UPGA represents, e.g., guards at missile sites, auto plants, steel mills, rubber plants, etc.

The only change proposed is to enable a larger number of unions to represent guards by removing some of the certification limitations from unions which represent nonguard employees as well. The guards would continue to be in separate bargaining units, and would be represented by different labor organizations than the employers' nonguard employees. If you believe that these limitations are insufficient, the provision could be redrafted to prohibit a local union from representing guards if its national or international represents nonguard employees of the employer at the same location.

Commerce has no objection to this proposal. The CEA speculates that such a change might result in more sympathy strikes by the guard employees. Labor does not believe that this concern is warranted. Moreover, most contracts involving guard employees contain arbitration and no-strike clauses which would prohibit sympathy strikes. These clauses would continue to be included in contracts for guard employees since these employees are particularly vulnerable to replacement during strikes and have, therefore, sought the protection of arbitration.

3. Mandatory Injunction. CEA, Commerce and Labor all agree that the law should be amended to require the NLRB to seek preliminary injunctions against discriminatory discharges which are committed prior to the execution of an initial contract.

Labor would also require mandatory injunctions for both employer and union refusals to bargain. Such an injunction does not impose any penalty nor does it moot any legal objections which the parties may have to allegations of any wrongdoing. The injunction does not require the parties to sign a contract or to pay out any money. It simply directs them to meet and confer.

There was some concern expressed that an injunction would limit an employer's opportunity to obtain judicial review of a unit determination made by the Board. This issue would, of course, only arise where there is a first contract. Moreover, as already indicated, the injunction would not moot either the employer's objection or the subsequent legal substantive proceedings. In addition, an injunction is only issued by a court which will not grant the Board's request until after a hearing at which the objecting party can raise legal challenges. Typically, the court will grant an injunction only if there is "reasonable cause to believe" that an unlawful refusal to bargain has occurred. Thus, even at this early stage, the objecting party has a chance to convince the court that the Board's conclusions are clearly wrong. The party would also have a full opportunity to present its arguments when the Board's decision is reviewed by the courts.

Finally, it should be noted that a failure to grant a preliminary injunction for a refusal to bargain can do irreparable harm to the union and to the employees. If an employer could refuse to bargain until the completion of prolonged legal proceedings, union support among the employees could be severely eroded because of the union's obvious ineffectiveness. Even after a favorable court decision, it might not be easy for the union to restore confidence among the employees. Where a balance has to be struck prior to final court review between the rights of two parties, that balance should favor the party who has been judged to be legally correct by an administrative agency after full opportunity to consider the views of both sides.

4. Foreign Flags. It was agreed to omit any provision which would permit unions to attempt to organize foreign flagships which are American owned and which have their primary contacts with the United States. It was suggested, however, that the Presidential Message indicate a concern over foreign flags and the possibility of changes in the tax law.

5. Economic Strikers. No agreement was reached on this issue. Labor believes strongly that its proposed amendment provides crucial employment safeguards in the limited context of a first contract situation when most unions representing non-craft workers are relatively weak. In this connection, it should be noted that strike settlements generally include a provision guaranteeing strikers their previous jobs. It is expected that this provision would have its largest impact in the organization of hotel, motel and restaurant workers, retail workers and maintenance employees. The provision would not have a substantial impact on employment practices. Those few employers who choose to operate during a strike would still be able to hire temporary replacements and continue production. These replacements would almost always be considered probationary employees and would thus normally be subject, even without this provision, to termination during the probationary period. The law currently prohibits the replacement of employees who are striking because of unfair labor practices. Most strikes, however, are for economic reasons and it would be difficult to prove any unfair labor practices.

Both CEA and Commerce oppose this provision. CEA believes that the provision will induce more strikes and will result in larger wage increases, although it cannot estimate how substantial these increases will be. Commerce opposes the provision on the ground that it would give unions an additional economic weapon.

UNITED STATES DEPARTMENT OF COMMERCE
The Assistant Secretary for Policy
Washington, D.C. 20230

July 8, 1977

MEMORANDUM FOR Stu Eizenstat

From: Jerry J. Jasinowski

Subject: Labor Law Reform

We have reviewed the Department of Labor's draft memorandum (7/8/77) on the 5 outstanding issues with respect to labor law reform and have the following comments:

1. Mandatory injunctions

The Department of Commerce recognizes that in a limited number of instances employers refuse to bargain in good faith and delay unnecessarily the bargining process. The NLRA now gives the Board the discretionary authority to seek preliminary injunctions in cases of refusal to bargain. It is true that the Board has exercised this discretionary power only rarely. Rather than make the seeking of preliminary injunctions mandatory and putting many more collective bargaining cases into the courts, Commerce would prefer that the President strongly encourage the Board to use its existing discretionary powers.

If the proposed change were enacted, the work load on the Board, the courts and on business would be substantially increased by forcing the Board and the employer to present detailed arguments for and against the issuance of the injunction whether it is justified or not. We are concerned about making a statutory change until it has been demonstrated that the same objective cannot be achieved through more aggressive Board action.

2. Economic strikers

The Department of Commerce has two principal concerns about this provision: that it will reduce economic efficiency and that it may disturb the delicate balance between management and

labor rights in the collective bargaining process.

First the guarantee of job replacement is likely to lead to greater first contract work stoppages. Although it is difficult to estimate how many more lost work days would result from the economic striker provision, the effect would be substantial, especially in the South. In addition, the guarantee of a return job might also lead labor to negotiate a greater wage increase in the first contract to more fully close the gap between union and non-union wages. While closing this gap is a desirable objective, making this adjustment in one step has inflationary implications.

Finally, the Department recognizes that a balance has evolved over the years between the rights of management and labor. Industry strongly feels that current law requires both management and labor to take risks in a strike situation and that requiring an employer to give an employee his job back at the end of a strike significantly reduces the risk that labor incurs. Given the other changes in labor law which this Administration has agreed to support, Commerce questions whether accepting this additional provision will not significantly alter the existing balance.

WASHINGTON

Date: July 12, 1977

MEMORANDUM

FOR ACTION:
The Vice President
Bob Lipshutz
Jack Watson
Landon Butler
Bert Lance
Charlie Schultze

FOR INFORMATION:

Frank Moore

FROM: Rick Hutcheson, Staff Secretary

SUBJECT: Eizenstat/Johnston memo dated 7/11/77 re Labor Law Refor

NOTE: MESSAGE TENTATIVELY SCHEDULED TO GO TO HILL ON FRIDAY, JULY 15, 1977.

YOUR RESPONSE MUST BE DELIVERED TO THE STAFF SECRETARY BY:

TIME: 8:00 A.M.

DAY: Wednesday

DATE: July 13, 1977

NO EXTENSIONS

ACTION REQUESTED:

_X_ Your comments

Other:

STAFF RESPONSE:

____ I concur. ____ No comment.

Please note other comments below:

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately. (Telephone, 7052)

WASHINGTON

Date: July 12, 1977

MEMORANDUM

FOR ACTION:
The Vice President
Bob Lipshutz
Jack Watson
Landon Butler
Bert Lance
Charlie Schultze

FOR INFORMATION:

Frank Moore

FROM: Rick Hutcheson, Staff Secretary

SUBJECT: ~~Eizenstat~~/Johnston memo dated 7/11/77 re Labor Law Refo

NOTE: MESSAGE TENTATIVELY SCHEDULED TO GO TO HILL ON FRIDAY, JULY 15, 1977.

YOUR RESPONSE MUST BE DELIVERED TO THE STAFF SECRETARY BY:

TIME: 8:00 A.M.

DAY: Wednesday

DATE: July 13, 1977

NO EXTENSIONS

ACTION REQUESTED:

_X_ Your comments

Other:

STAFF RESPONSE:

___ I concur. ___ No comment.

Please note other comments below:

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately. (Telephone, 7052)

WASHINGTON

Date: July 12, 1977

MEMORANDUM

FOR ACTION:
The Vice President
Bob Lipshutz
Jack Watson
Landon Butler
Bert Lance
Charlie Schultze

FOR INFORMATION:

Frank Moore

FROM: Rick Hutcheson, Staff Secretary

SUBJECT: Eizenstat/Johnston memo dated 7/11/77 re Labor Law Refo

NOTE: MESSAGE TENTATIVELY SCHEDULED TO GO TO HILL ON FRIDAY, JULY 15, 1977.

YOUR RESPONSE MUST BE DELIVERED TO THE STAFF SECRETARY BY:
TIME: 8:00 A.M.
DAY: Wednesday
DATE: July 13, 1977

NO EXTENSIONS

ACTION REQUESTED:
_X_ Your comments
Other:

STAFF RESPONSE:
____ I concur. ✓ ____ No comment.
Please note other comments below:

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately. (Telephone, 7052)

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

JUL 12 1977

MEMORANDUM FOR: RICK HUTCHESON
White House staff

FROM: Bo Cutter

SUBJECT: Eizenstat memo on Labor-Law Reform

Following are OMB comments on the five remaining labor-law reform issues discussed in Stu Eizenstat's decision memo to the President.

1) Equal Access

Proposal: The Labor Department has proposed alternative language which conditions a union's right to approach unorganized employees at a worksite regarding a representation on similar actions by the employer, and couches that language in terms of an employee's right to information. Rules protecting this right to information would be promulgated by the NLRB and due regard given to employer property rights and his concern for continuity of production.

Comment: No objection in principle. However, we do not believe that the Labor proposed alternative will alleviate the definitional and enforcement problems raised by the original proposal, particularly because of the pervasive presence of management on the shop floor and the uncertainty of what would constitute managerial comment refusing equal access to opposing views. This is a highly controversial provision, and the proposed language may not diminish the opposition envisioned under the original proposal.

2) Replacement of Economic Strikers

Proposal: The Labor Department proposes language to allow employees who strike over economic issues in bargaining for an initial contract to job reinstatement rights even if a replacement would have to be fired. Currently, replacement and retention of economic strikers is within an employer's rights. However, employees do have reinstatement rights where a strike is over an unfair labor practice.

Comment: Agree with CEA and Commerce that this proposal should be opposed. This is a strong organizing tool and would upset the labor-management balance developed over the past years. In addition, until a contract is signed an employer has the right to hire his own work force, and re-employment is a legitimate issue for bargaining.

3) Greater Protection for Guards

Proposal: The law prevents guards from affiliating with a union containing non-guard employees, ostensibly to preserve a loyal group of employees to protect property and people at a worksite. Labor proposes to allow a union to represent guards at a plant if its national or international division did not represent non-guards at that plant. This will allow separate AFL-CIO unions to represent guards and non-guards at one plant.

Comment: Oppose. No evidence is presented that the guards have been harmed under the law. If there is no such harm, protection of the employer's property is a good reason for current law. This proposal is also a potential organizing mechanism for the larger AFL-CIO unions at the expense of the smaller independent unions. No evidence is cited that the guard union opinions were sought.

4) Mandatory Injunctions for Unlawful Dismissal and Refusal to Bargain

Proposal: Labor argues that preliminary injunctions should be mandated for refusal to bargain after an expedited election as well as in cases of alleged unlawful discharge. Under current law, the NLRB has discretion in issuing preliminary injunctions in the above situations.

Comment: No objection to the proposal. The offenses cited by Labor are as serious offenses against unions as are those offenses against employees for which the law now provides authority to seek injunctions.

5) Foreign Flag Ships

Proposal: Include American-owned foreign flag ships under the National Labor Relations Act.

Comment: Agree with the decision to drop the proposal as too complicated to be resolved in a short time.